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No. 82-654

In the Supreme Court of the United States

OCTOBER TERM, 1982

ATLAS TILE & MARBLE COMPANY, ET AL., PETITIONERS

v.

JAMES R. SHAHADY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an employee may be reimbursed under Section 7 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 907, for necessary medical services causally related to a compensable injury, which were obtained by the employee after he had been discharged from further treatment against his objections by a physician selected by his employer.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases:

Atlantic & Gulf Stevedores, Inc. v. *Neuman*, 440 F.2d 908 7

Betz v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805 8

Buckhaults v. *Shippers Stevedore Co.*, 2 Ben. Rev. Bd. Serv. (MB) 277 ..... 7, 9

Bulone v. *Universal Terminal & Stevedoring Corp.*, 8 Ben. Rev. Bd. Serv. (MB) 515 3

District of Columbia v. *Greater Washington Central Labor Council*, 442 A.2d 110, petitions for cert. pending, Nos. 82-116 and 82-146 2

Jackson v. *Navy Exchange Service Center*, 9 Ben. Rev. Bd. Serv. (MB) 437 8

Wilson v. *Sun Shipbuilding & Dry Dock Co.*, 2 Ben. Rev. Bd. Serv. (MB) 172 7

Maryland Shipbuilding & Drydock Co. v. *Jenkins*, 594 F.2d 404 7

Page

Cases—Continued:

Nardella v. *Campbell Machine, Inc.*, 525 F.2d 46 7

Rogers v. *Pal Services*, 9 Ben. Rev. Bd. Serv. (MB) 807 8

Scott v. *C & C Lumber Co.*, 9 Ben. Rev. Bd. Serv. (MB) 815 8

Shell v. *Teledyne Movible Offshore, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 585, aff'd mem., No. 81-4487 (5th Cir. Dec. 9, 1982) 7

Voris v. *Eikel*, 346 U.S. 328 8

Walker v. *AAF Exchange Service*, 5 Ben. Rev. Bd. Serv. (MB) 500 7

Statutes and regulations:

District of Columbia Workmen's Compensation Act, D.C. Code Ann. (1973 & 1981):

§ 36-301 *et seq.* (1981) 2, 6
§ 36-307 (1981) 6
§§ 36-501 to 36-502 (1973) 2

Longshoremen's and Harbor Worker's Compensation Act, 33 U.S.C. (& Supp. IV) 901 *et seq.* 2, 6

Section 7, 33 U.S.C. 907 6
Section 7(b), 33 U.S.C. 907(b) 4
Section 7(d), 33 U.S.C. 907(d) 2, 3, 4, 5, 6, 7
Section 21(c), 33 U.S.C. 921(c) 5

Pub. L. No. 86-757, Section 7(b), 74 Stat. 900 7

Page

Statutes and regulations—Continued:

20 C.F.R. :

Section 702.406 ..... 3, 4
Section 702.422(b) 3

Miscellaneous:

H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972) 8

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-11a) is reported at 682 F.2d 968. The opinion of the Benefits Review Board (Pet. App. 25a-43a) is reported at 13 Ben. Rev. Bd. Serv. (MB) 1007. The decision of the administrative law judge (Pet. App. 44a-50a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1982. A petition for rehearing was denied on July 16, 1982 (Pet. App. 3a-5a). The petition for a writ of certiorari was filed on October 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 11, 1975, respondent James Shahady, a marble mason employed by petitioner Atlas Tile & Marble Company, injured his left knee while on the job (Pet. App.

26a, 45a). Although Shahady returned to work two days later, his condition grew progressively worse. Approximately one week after injuring himself, Shahady consulted his family physician, Dr. Pecson (*id.* at 26a, 46a). At Atlas's request, on October 8, 1976, Shahady consulted Dr. Gibson, an orthopedic surgeon, who subsequently performed surgery (*id.* at 26a, 45a-46a).

In April 1978, at an "unpleasant" meeting in which Shahady requested further treatment, Dr. Gibson discharged Shahady from his care, telling Shahady he " 'was fine,' [and] 'there was nothing wrong with [his] leg' " (Pet. App. 9a). Shahady, who continued to experience difficulties with his knee, returned to Dr. Pecson, who referred him to an orthopedic surgeon, Dr. Schuster. Dr. Schuster and another surgeon, Dr. Edelson, operated on Shahady on June 29, 1978 (*id.* at 26a, 46a). Dr. Schuster also hospitalized Shahady for non-surgical treatment of his knee in November 1978 (*id.* at 46a).

2. Shahady applied for payment under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. (& Supp. V) 901 *et seq.* (as extended to cover employees under the District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36-501, 36-502 (1973)[1]), for the medical services rendered by Drs. Pecson, Schuster, and Edelson. Although concluding that the treatment provided by Drs. Pecson, Schuster, and Edelson was "necessary" and "causally related" to Shahady's injury, the administrative law judge ("ALJ") denied Shahady's

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[1]The District of Columbia has since enacted a new workers' compensation statute. D.C. Code Ann. § 36-301 *et seq.* (1981). See *District of Columbia* v. *Greater Washington Central Labor Council*, 442 A.2d 110 (1982), petitions for cert. pending, Nos. 82-116 and 82-146 (filed July 20 and 26, 1982). Under the new local Act, District of Columbia workers who are not otherwise subject to the coverage provisions of the LHWCA are no longer within the LHWCA's scope.

claim (Pet. App. 10a, 46a-47a). The ALJ found that Dr. Gibson had not refused to provide Shahady further medical treatment, and that Shahady's failure to request Atlas to authorize treatment by Dr. Pecson therefore barred his claim under Section 7(d) of the LHWCA, 33 U.S.C. 907(d).[2] The ALJ also concluded that Shahady had failed to obtain a prior written consent to change physicians (see 20 C.F.R. 702.406) as to Drs. Schuster and Edelson, and that Drs. Pecson, Schuster, and Edelson had not filed timely medical reports pursuant to Section 7(d) of the LHWCA, 33 U.S.C. 907(d) (Pet. App. 26a-27a, 47a-49a).[3]

3. The Benefits Review Board, by a divided vote, affirmed the ALJ's decision. The Board overturned an earlier decision[4] and held that Shahady was required to obtain

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[2]Section 7(d), 33 U.S.C. 907(d), provides in pertinent part:

> An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless he shall have requested the employer to furnish such treatment or services, or to authorize provision of medical or surgical services by the physician selected by the employee, and the employer shall have refused or neglected to do so * * *.

[3]The relevant portion of Section 7(d), 33 U.S.C. 907(d) provides:

> [N]or shall any claim for medical or surgical treatment be valid and enforceable, as against such employer, unless within ten days following the first treatment the physician giving such treatment furnish to the employer and the Secretary a report of such injury and treatment, on a form prescribed by the Secretary. The Secretary may, however, excuse the failure to furnish such report within ten days when he finds it to be in the interest of justice to do so, and he may, upon application by a party in interest, make an award for the reasonable value of such medical or surgical treatment so obtained by the employee.

See also 20 C.F.R. 702.422(b) ("For good cause shown, the deputy commissioner or administrative law judge may excuse the failure to file the report within 10 days, and further, may make an award for the reasonable value of such medical care.").

[4]*Bulone* v. *Universal Terminal & Stevedoring Corp.*, 8 Ben. Rev. Bd. Serv. (MB) 515 (1978).

authorization under Section 7(d) prior to consulting with Dr. Pecson, even though Dr. Pecson was Shahady's "initial free choice" under Section 7(b) of the Act, 33 U.S.C. 907(b) (Pet. App. 29a-30a). The Board concluded that Shahady was also obligated to obtain a separate authorization for Dr. Schuster (*id.* at 30a-31a), and that, in any event, Shahady should have obtained a written consent to change physicians (20 C.F.R. 702.406; see 33 U.S.C. 907(b)) before consulting with Drs. Schuster and Edelson (Pet. App. 31a).

The Board also rejected Shahady's contention that his failure to obtain authorization for the services of Drs. Pecson, Schuster, and Edelson was excused by his employer's failure to provide medical care (Pet. App. 31a-33a). The Board recognized that "[w]hen the actions of an employer are such that they are tantamount to a refusal [of further treatment], the claimant is thereby entitled to * * * reimbusement of any subsequently obtained treatment" without prior authorization (*id.* at 31a). The Board held, however, that substantial evidence supported the ALJ's finding that Dr. Gibson's discharge of Shahady from further treatment had not been a refusal of further medical care (*id.* at 32a-33a).

Finally, the Board asserted that all three physicians' failure to file medical reports required under Section 7(d) would have barred Shahady's claim even if the proper authorizations and written consents to change physicians had been obtained (Pet. App. 34a).

4. Shahady sought review of the Board's ruling in the court of appeals.[5] The court reviewed the evidence in light

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[5]The Director of the Office of Workers' Compensation Programs did not participate in the proceedings before the ALJ and the Benefits Review Board. After Shahady had filed his petition for review in the court of appeals, the Director moved to amend and reform the caption in order to be included as a respondent. The court of appeals granted the

of the settled rule that factual doubts should be resolved in the claimant's favor in cases of this nature, and prior cases holding that "[w]hen an employee is told by the employer's physician that 'he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer' " (Pet. App. 9a). The court "conclude[d] that the ALJ's determination that Shahady was not refused necessary treatment is unsupported by substantial evidence" (*id.* at 10a). It found it unnecessary to decide whether Shahady would have been otherwise required to request authorization for his medical services (*ibid.*). The court also ruled that, in light of the employer's refusal to provide necessary further treatment, the ALJ abused his discretion in refusing to excuse the doctors' failure to file medical reports in a timely fashion (*id.* at 10a-11a).

ARGUMENT

The decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Indeed, the court below simply adopted a decision of the Fifth Circuit and established Board precedent, reviewed the evidence, and concluded that the ALJ's determination was not supported by substantial evidence. The court's decision is correct and consistent with the purposes of the LHWCA. Further review by this Court is unwarranted.

1. Section 7(d) of the LHWCA, 33 U.S.C. 907(d), excuses an employee from obtaining authorization for medical treatment as a precondition to reimbursement if the employer has refused to provide or authorize medical treatment. The court of appeals found that Shahady had

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motion, noting in a per curiam opinion that the Director should be named as a respondent in all cases in which judicial review is sought pursuant to 33 U.S.C. 921(c) (Pet. App. 12a-24a; 673 F.2d 479). The Director supported Shahady's position on the merits.

been refused further treatment by Dr. Gibson, the physician to whom he had been sent by his employer. The court rejected the ALJ's contrary determination as unsupported by substantial evidence. The evidence showed that Shahady complained of continued pain in his leg and requested further treatment from Dr. Gibson, but was discharged from further care and told he was " 'fine,' " and " 'there was nothing wrong with [his] leg * * *.' " The ALJ explicitly found that the subsequent treatment was necessary and causally related to Shahady's injury (Pet. App. 9a-10a). This fact-bound conclusion does not justify review by the Court.

2. Petitioners allege that the court of appeals' decision establishes broad principles inconsistent with the congressional intent underlying the LHWCA (Pet. 9-17). In particular, they suggest that "an employee may [now] seek medical treatment on his own without complying with the statute whenever a dispute [with the employer's physician] has arisen" (*id.* at 14; see also *id.* at 9-10). In fact, however, the court of appeals held only that discharge of an employee by a doctor to whom the employer has referred him *may* amount to a refusal by the employer to provide requested medical services. Its decision is the first appellate exploration of the amended Section 7(d) provision for excusing prior authorization. Review of such a question of statutory interpretation, heavily influenced by factual considerations, would be premature without further development in the other courts of appeals.[6]

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[6]The impact of the court's decision even in the District of Columbia is diminished by the recent enactment of the new District of Columbia workers' compensation statute. D.C. Code Ann. § 36.301 *et seq.* (1981). See note 1, *supra*. Injured non-maritime workers in the District will now seek reimbursement under D.C. Code Ann. § 36-307 (1981) rather than Section 7 of the LHWCA.

Moreover, the court of appeals' decision is consistent with the only other appellate decision addressing the same question, under the pre-1972 LHWCA.[7] In *Atlantic & Gulf Stevedores, Inc.* v. *Neuman*, 440 F. 2d 908, 911 (1971), the Fifth Circuit held that "when an injured employee has been told by physicians furnished by an employer that he is recovered from his injury and requires no further treatment, he has, in effect, been refused treatment by the employer, and he needs only to establish that treatment he subsequently procures on his own initiative, was necessary treatment for the injury in order to be entitled to such treatment at the expense of the employer.' "[8] The court's decision is also in accord with a plethora of recent Board decisions recognizing that discharge by a physician may constitute refusal to provide treatment.[9]

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[7]Neither *Maryland Shipbuilding & Drydock Co.* v. *Jenkins*, 594 F.2d 404 (4th Cir. 1979), nor *Nardella* v. *Campbell Machine, Inc.*, 525 F.2d 46 (9th Cir. 1975), is concerned with the effect of discharge by the employer's physician. In *Jenkins* the employee declined to consult with the physician to whom the employer had referred him; in *Nardella* the employee never requested treatment from the employer and the employer did not refer the employee to any physician.

[8]Although *Neuman* was decided before the effective date of the 1972 amendments, the amendments did not change the substantive effect of Section 7(d). Under both versions of that section the employee must request the employer to provide or authorize treatment before seeking treatment on his own initiative. The *Neuman* court specifically excused the employee's failure to notify the employer that he intended to seek further medicial treatment after discharge by the employer's physician. Before 1972, Section 7 did not allow the employee an initial free choice of physician, but did require the employer to maintain a "panel" of physicians in the community from which the employee could choose an attending physician. Pub. L. No. 86-757, Section 7(b), 74 Stat. 900.

[9]See, *e.g.*, *Shell* v. *Teledyne Movible Offshore, Inc.*, 14 Ben. Rev. Bd. Serv. (MB) 585, 590 (1981), aff'd mem., No. 81-4487 (5th Cir. Dec. 9, 1982); *Walker* v. *AAF Exchange Service*, 5 Ben. Rev. Bd. Serv. (MB) 500, 509-510 (1977); *Buckhaults* v. *Shippers Stevedore Co.*, 2 Ben. Rev. Bd. Serv. (MB) 277, 279-280 (1975); *Kilson* v. *Sun Shipbuilding & Dry Dock Co.*, 2 Ben. Rev. Bd. Serv. (MB) 172, 175-177 (1975). The Board

Contrary to petitioners' assertion (Pet. 9-17), the court of appeals' decision is entirely consonant with the congressional intent underlying the 1972 amendments to the LHWCA. The stated purposes of the amendments were to "[meet] the needs of the injured employee and his family" and to "assur[e] that the employer bears the cost of unsafe conditions * * *." H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 1 (1972). See also *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953) ("[t]his Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results"). By ruling that an employee's discharge by an employer's physician may constitute a refusal to furnish necessary medical services, the court of appeals properly placed the responsibility for medical misjudgment on the responsible party. The decision does not, as petitioners suggest (Pet. 14-16), strip the Deputy Commissioner of his supervisory power by allowing employees to disregard the requirements of prior authorization and written consent to change physicians in all cases in which a medical dispute has arisen. The employee must still show that his post-discharge treatment was both "necessary" and "causally related" to his injury in order to recover (Pet. App. 10a, 46a-47a).

3. Petitioners also maintain (Pet. 22-24) that the court of appeals unjustifiably excused Shahady's physicians' failure to comply with the medical reporting requirements of Section 7(d). Section 7(d) states that a physician's failure to file a report within ten days may be excused by the Secretary in

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has recognized, however, that discharge is not always tantamount to a refusal to provide treatment. See, *e.g.*, *Betz* v. *Arthur Snowden Co.*, 14 Ben. Rev. Bd. Serv. (MB) 805, 809 (1981); *Scott* v. *C & C Lumber Co.*, 9 Ben. Rev. Bd. Serv. (MB) 815, 824 (1978); *Rogers* v. *Pal Services*, 9 Ben. Rev. Bd. Serv. (MB) 807, 811 (1978); *Jackson* v. *Navy Exchange Service Center*, 9 Ben. Rev. Bd. Serv. (MB) 437, 439 (1978).

the interest of justice. The court of appeals held that, by not excusing the failure to file timely reports, the ALJ had abused his discretion. That ruling followed directly from its holding that the employer had refused to provide further treatment and from the Board's own precedent[10] establishing that in such circumstances, failure to file timely reports may be excused (Pet. App. 11a). Such a narrow ruling concerning the exercise of discretion does not warrant further review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] *Buckhaults* v. *Shippers Stevedore Co.*, *supra*, 2 Ben. Rev. Bd. Serv. (MB) at 280.

DOJ-1982-12